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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-15

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, a Political Subdivision of the State of California, PEOPLE OF THE STATE OF CALIFORNIA, LEAGUE TO SAVE LAKE TAHOE, and SIERRA CLUB,

Petitioners,

v.

TED JENNINGS, OLIVER KAHLE, HARVEY'S WAGON WHEEL, INC., and COUNTY OF DOUGLAS, a Political Subdivision of the State of Nevada,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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CORRECTION TO STATEMENT OF THE CASE

Respondents state (at p. 3) that they filed Motions for Summary Judgment as well as Motions to Dismiss the Complaint, in the District Court. This is not correct. Respondents Jennings, Kahle, Harvey's, and Douglas County, filed Motions to Dismiss only. (Record). *See,* App. A to Petition (Ninth Circuit Opinion at p. 4–5).

I., II. BY FAILING TO REVIEW THE ABSENCE AND ADEQUACY OF THE "FINDINGS" MADE BY THE APPROVING AUTHORITY, THE COURT OF APPEALS RELEGATES CRITICAL ISSUES TO POTENTIALLY CONFLICTING INTERPRETATIONS BY DIFFERENT STATES, AND IGNORES THE PRINCIPLES WHICH SUGGEST REQUIRING REASONED FINDINGS TO SUSTAIN

ADJUDICATORY DECISIONS UNDER INTERSTATE REGULATIONS.

The assertion by respondents (at p. 8) that the continuation of "differences in the procedures and the laws applicable to the various political subdivisions surrounding Lake Tahoe" is intended by the Compact, is in fact directly contrary to the actual intent. "[T]he political fragmentation in the basin has prevented a unified and organized approach to the mounting problems." S. Rep. 91–510, 91st Cong., 1st Sess. (1969) appearing at 115 Cong. Rec. 3308–3309 (1969). These concerns lead directly to the Compact and are reflected in the policy sections: "the region is experiencing problems of resource use and deficiencies of environmental control" and "it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan". Compact, Art. I.

Respondents contend (at p. 5–6) that under the Compact, procedures are left to the local jurisdictions. It is indisputable however, that the TRPA land use ordinance established both substantive and procedural standards. Sections 7.13 and 8.33 require the determination and finding of specified conditions. Section 4.00 is entitled "Permit Procedure". Sections 4.22 and 8.27 require the applicant to furnish specified information, and section 4.33 requires the TRPA to furnish assistance to local authorities in interpreting the ordinance. The answer to the question of whether findings are required to sustain adjudicatory approvals, clearly is to be found in the TRPA ordinance, and is not left to the numerous and

diverse state and local jurisdictions in the Tahoe Basin.

Clearly, the projects in issue are in seeming violation of § 7.13 and § 8.33 of the TRPA Land Use Ordinance. Section 8.33 prohibits "*any* substantial harmful environmental consequences." Respondents' own submissions in the Administrative Record conceded harmful environmental impacts, including causing the violation of applicable federal air quality standards. (Petition, at p. 29). Section 7.13 prohibits height greater than 40 feet unless the greater height "will better promote the protection of the environment". In reviewing these projects, the TRPA staff found "The opposite is true in that the combination of high intensity of use, maximum land coverage and excess building height degrades the environment." (Record, pl. exh. 2, doc. no. 16 at p. 5; pl. exh. 3, doc. no. 20 at p. 6; Reporters tr. at 189, 221–222).

In light of the facial inconsistency of the projects with TRPA's ordinance, the requirement for explanatory findings is no mere technicality but is instead essential in order "to exercise effective environmental controls", Compact, Art. I(c).[1]

Respondents cite (at p. 10) *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), but that decision actually lends them no support at all. *Overton Park* in-

[1] Respondents refer to a "voluminous" record (p. 9), but neither make citations to the record or refer to any evidence in the record to support the administrative decisions made. With respect to respondents' "exhaustion" argument (p. 9), no notice of the Douglas County proceedings was ever given to any of the respondents. Respondents participated in the TRPA review proceedings. California not only has a right, it has the duty, to enforce the TRPA Land Use Ordinance. Compact, Art. VI(b).

volved a "nonadjudicatory, quasi-legislative" hearing. *Id.* at 415. The case concerned road location decisions under statutes requiring that roads not be constructed through parks unless certain conditions were met. "This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* at 411. The Court even though informal action was involved, and though the statute was not framed in terms of findings, nevertheless required the making of an adequate record for judicial review.

The two cases cited by respondents (at p. 10) to show that Nevada follows the "implied findings" doctrine are inapplicable. Both cases concerned appellate review of lower judicial decisions. *See, Dutertre* v. *Shallemberger,* 34 P. 449 (Nev. 1893) (ejectment); *Buchanan* v. *Buchanan,* 523 P.2d 1 (Nev. 1974) (divorce). Contrary to respondents' assertions, the Nevada state courts have required findings and substantial evidence to sustain adjudicatory zoning decisions. *See, State ex. rel. Johns* v. *Gragson,* 515 P.2d 65, 67 (Nev. 1973); *City of Henderson* v. *Henderson Auto Wrecking,* 359 P.2d 743, 745 (Nev. 1961).

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS FEDERAL ACTION IS BARRED BY THE NEVADA 25-DAY STATUTE OF LIMITATIONS.

It is not surprising that a number of lawsuits followed the unexplained approval of large projects seemingly inconsistent with TRPA's regulations.

The administrative process did not become final until TRPA default approval. This occurred on September 15, 1973, with respect to Harvey's, and August 16, 1974, with respect to Jennings and Kahle. *See League to Save Lake Tahoe v. Tahoe Reg. Pl.,* 563 P.2d 582, 584–85 (Nev. 1977). A federal court lawsuit was commenced against Harveys on September 20, 1973, which was twice dismissed. Both dismissals were later reversed. *See, League to Save Lake Tahoe* v. *Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975); 558 F.2d 914 (9th Cir. 1977). On August 16, 1974, a case was filed in the Nevada state courts entitled *League to Save Lake Tahoe* v. *Tahoe Reg. Pl., supra,* against all of the respondents. That case attempted to litigate the TRPA ordinance issues raised in this case. The procedural dismissal however was affirmed. 563 P.2d 582 (Nev. 1977). Petitioner CTRPA attempted to file a comprehensive brief on the merits (Record, Def. exh. 35, Reporters tr. at 231) on June 4, 1975, discussing the same authorities relied upon below in this later federal suit. While the trial court dismissed the state court action on September 12, 1975, the federal court in Nevada had held on June 24, 1975 that there was no federal jurisdiction over these kinds of claims. That decision was not reversed until December 8, 1976, in *League to Save Lake Tahoe* v. *B.J.K. Corp.,* 547 F.2d 1072 (9th Cir. 1976).

The final Nevada state court decision was not rendered until May 3, 1977. A federal action raising the TRPA ordinance claims was not maintainable under the highest decision then applicable until December of

1976, and also would have been subject to abstention, abatement or discretionary dismissal while the state court action was pending.[2] *See, Fay* v. *Fitzgerald,* 478 F.2d 181 (2nd Cir. 1973) (discretionary dismissal).

The complexity of the Compact issues involved, changes in the law, and intervening decisions, create a situation in which the Nevada limitation statute should not be unnaturally distorted *post hoc,* to bar this action. Petitioners have proceeded in an orderly fashion in a so far vain attempt to prevent what they consider to be clear violations of governing interstate regulations.

NRS Ch. 278.025 (cited at p. 14) adds no support to respondents' position. It very clearly subordinates local jurisdictions in the Tahoe Basin to the TRPA. In arguing that the permits they received are variances authorized by NRS 278.010 to 278.630 so that the limitation in NRS 278.027 is applicable, respondents seek the benefit but not the burden of such interpretation. The Douglas County zoning ordinance (No. 167) requires commencement of construction of variances within six months, and completion within one year. (Record, pl. exh. 9, Art. 30 H.1 at p. 36; Reporters tr. at 194, 223).

Clearly, there has been no reliance here. Respondents were advised long ago of the claims raised, through prior litigation dismissed as a result of their own tactics. No compelling reason is presented to support both the ex-

[2] The period for appealing or petitioning for writ of certiorari pursuant to 28 U.S.C. § 1257, on the theory that the state limitation statute offends the compact or a federal claim had been disposed of, did not end until August 1, 1977.

pansion of the Nevada limitation statute to include Compact matters not included in the enumerated sections, and the ignoring of the notice filing requirement.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT BECAUSE THE ALLEGED NUISANCE IS ANTICIPATORY AND WAS APPROVED PURSUANT TO COMPACT, A STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING.

If it is true that petitioners have not cited a single case allowing the bringing of an anticipatory federal common law nuisance action in a Compact situation (p. 18), it is equally true that respondents cite no case not allowing such an action. A major basis for the petition is that inter-state obligations are a critical area of concern to this Court, and that this case presents critical issues which are not settled. Answers to questions such as "do states waive their common law rights when they agree to compacts" or "is there a general rule requiring findings to sustain interstate adjudicatory decisions", are essential to the effective functioning of the Compact mechanism in dealing with specific regional problems.

The contention that it is necessary to show that a nuisance will necessarily result is simply wrong given the stage of the proceedings. The Ninth Circuit quoted language from *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208, 248 (1901) ending with "the proofs must show such a state of facts as will manifest the danger to be *real and immediate.*" (Petition, App. A at p. 24). The Ninth Circuit left out the very next, all-important line which

states: "But such observations are not relevant to the case as it is now before us [demurrer]". 180 U.S. at 249.

Respondents' reliance (at p. 19) on *Ryan* v. *Pitkin Iron Corp.*, 444 F.2d 717 (10th Cir. 1971), is misplaced. That case was decided under Colorado, not federal, law. Even more importantly, the case concerned a sewage plant wherein manner of operation is critical to the presence or absence of nuisance conditions.

Here, the allegations are that the Tahoe Basin simply lacks the capacity to absorb the large volume of traffic and other problems to be generated by respondents' projects. Kahle's representative stated during the Douglas County proceedings that "as a 'rule of thumb' each hotel room generates about 10 cars a day. This includes gaming, service and other traffic as well." (Petition, App. F at p. 245). That one project (Hotel Oliver) would have 960 hotel rooms.

It is obviously the intention of respondents to attract the visitors and their attendant incidental effects including automobile traffic, that the projects are designed to accommodate. Unlike issues concerning the operation of a sewage plant (e.g., odor, degree of treatment), manner of operation is not dispositive of the question of whether the type of nuisance alleged will occur.

The effects on California of respondents' projects are most direct. Respondents' representative stated in the Administrative Record that it is necessary for most (two-thirds to three-fourths) of the hotel-casino employees to find housing in California. (Petition, App. F at p. 244, 252). Respondents' projects, adjacent to California, will

burden California directly in terms of air pollution, housing demands, sewage demands, transportation demands, and directly and adversely affect the ability of California to protect that part of the Tahoe Basin located in California.

Accordingly, California should have a trial on the merits to determine its substantial common law nuisance claims. While the exact situation is novel, the principles enunciated by this Court in the nuisance cases cited in the Petition, are clearly applicable to this situation.

CONCLUSION

Respondents have been unable to effectively minimize the obvious importance of this case. It is therefore respectfully submitted that the writ of certiorari should issue.

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Respectfully submitted,

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